IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-704

LUPE GARCIA, *Petitioner*

v.

STATE OF NEW MEXICO, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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CASES

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Petitioner, LUPE GARCIA, respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Court of Appeals of the State of New Mexico entered on July 31, 1978.

I
OPINION BELOW

The unreported Memorandum Opinion of the New Mexico Court of Appeals is attached as Appendix "A".

A decision of that Court on the interlocutory appeal in this matter is reported at 90 N.M. 577, 566 P.2d 426 (Ct. App. 1977), and is attached as Appendix "B". That opinion reversed the trial court's ruling on Petitioner's Motion to Suppress Evidence and remanded the case for trial. There are no other reported opinions in this matter.

II
GROUND ON WHICH JURISDICTION IS INVOKED

The final judgment of the New Mexico Court of Appeals was entered on the thirty-first day of July, 1978. This Petition For Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

III
QUESTIONS PRESENTED

1. Whether the New Mexico Court of Appeals erred in holding admissible evidence obtained pursuant to a search warrant in which the affidavit failed to establish probable cause.

2. Whether the New Mexico Court of Appeals erred in not granting Petitioner a hearing into the truthfulness of statements contained in the affidavit after the Petitioner made a preliminary showing that statements contained in the affidavit were false.

3. Whether the New Mexico Court of Appeals erred in upholding the validity of an affidavit for search warrant that was prepared in part by the Assistant District Attorney who was to prosecute the matter at trial.

IV
CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitution provision involved is the Fourth Amendment of the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

V
STATEMENT OF THE CASE

On the morning of the tenth day of September, 1976, Deputy Sheriff Michael Parra prepared an affidavit for a search warrant. Parra presented the affidavit to Assistant District Attorney James Blackmer for approval. Blackmer did not approve the affidavit as Parra had prepared it. Blackmer added information to the affidavit and then approved it. Deputy Sheriff Parra then proceeded to District Judge Joseph Ryan with the affidavit. Judge Ryan issued Parra a search warrant based on the affidavit to which Parra had sworn in front of the Honorable Judge Ryan. On the afternoon of the tenth day of September, 1976, Deputy Parra and other deputy sheriffs executed the search warrant at Petitioner's residence, finding and seizing a certain amount of heroin, methadone, and other evidence. Petitioner was arrested by the Sheriff's deputies.

Petitioner filed a motion to suppress the evidence seized. A hearing was held on that motion on the seventeenth day of December, 1976. District Judge James A. Maloney entered an Order suppressing the evidence seized. The State appealed the trial court's decision, whereupon the New Mexico Court of Appeals reversed the District Court, holding that the evidence was admissable. The New Mexico Supreme Court denied Certiorari on this matter. Upon removal to the District Court of the State of New Mexico, Bernalillo County, an Amended Motion to Suppress was heard. At said hearing it was established that the Assistant District Attorney added language to the affidavit search warrant by a different typewriter which said that informant last observed heroin sales by Defendant at the described premises between August 10 and September 10, 1976. Additionally, evidence was presented that the Defendant was hospitalized, and not at his residence, throughout the period of August 24, 1976, and September 1, 1976. The trial court denied the Amended Motion to Suppress. A stipulated facts trial was held. The stipulation of facts for a non-jury trial is attached hereto as Appendix "C". The Petitioner was found guilty. Petitioner appealed to the New Mexico Court of Appeals where the conviction was summarily upheld without an opinion. Thus the Court of Appeals refused to consider the fact that the truth of the affidavit for search warrant had been put in question, which fact was not before it on the first appeal decided May 17, 1977.

The New Mexico Supreme Court denied Certiorari and the New Mexico Court of Appeals entered its mandate on the thirty-first day of July, 1978.

VI
REASONS FOR GRANTING CERTIORARI

The decision of the New Mexico Court of Appeals is in conflict with the decisions of this Court, and is in conflict

with its own prior decisions. The New Mexico Court of Appeals did not take its own prior decisions, or well-established rules of law as decided by this Court into consideration when deciding the issues presented by Petitioner.

A. THE AFFIDAVIT UNDERLYING THE SEARCH WARRANT DOES NOT ESTABLISH PROBABLE CAUSE AS IS REQUIRED BY THE FOURTH AMENDMENT.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourth Amendment is clear in its language that a valid search warrant may only be issued upon an affidavit which is sufficient to demonstrate to a Magistrate or other judge that probable cause exists for the issuance of such a warrant.

The affidavit underlying the search warrant in the instant case, attached hereto with Appendix "C", does not by itself establish probable cause. The affidavit is unable to place any contraband in Petitioner's residence during the time period covered by the affidavit, August 10, 1976, through September 10, 1976.

The affidavit contains statements made by four different individuals, the affiant, Deputy Sheriff Parra, and three unnamed informants who gave information to Deputy Parra. As is demonstrated by the affidavit, Deputy Parra

had no independent knowledge of his own and relied solely upon the statements made by the three unidentified informants. Probable cause then, if it is to be established at all, must be established solely on the statements made by the informants, and not on the statements made by either the affiant or others.

One confidential informant claims to have purchased heroin from the Petitioner a full month prior to the date of the affidavit and warrant. The affidavit makes no mention of how much heroin was purchased or where the transaction took place. The affidavit does not claim that the transaction took place at the Petitioner's residence. This same informant also claims to have seen heroin at Petitioner's residence, but not within the time period covered by the affidavit.

All three informants claim that Petitioner is involved in the trafficking of heroin and uses heroin. From these statements, Parra assumed that Petitioner had a supply of heroin in his home on the tenth day of September, 1976, the date of the affidavit. When the statements of all three informants are taken on their face, they cannot place any heroin or other contraband in Petitioner's residence at any time within the one month period covered by the affidavit.

Based upon information that Parra had recieved, that Petitioner used and sold heroin, Deputy Parra had suspicions that Petitioner did possess heroin on the tenth day of September, 1976, but as stated in the affidavit, this is only an assumption based upon what Parra had been told. This Court has found search warrants invalid when the affidavit underlying the warrant was based upon suspicion or belief. (*Nathanson v. United States*, 290 U.S., 41, 54 S. Ct. 11, 78 L. Ed. 159 (1933)).

As for the information contained in the affidavit of events occurring more than one month prior to the issuance

of the warrant, this Court has held in *Sgro v. United States*, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1933) that:

> While the statute does not fix a time with which proof of probable cause must be taken by the judge or commissioner, it is manifest the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. (Page 210)

The information contained in the affidavit cannot place any contraband in the Petitioner's residence during the time period covered by the affidavit; therefore any allegation of contraband in the Petitioner's residence is so old as to be stale, and thus not supportive of a finding of probable cause for the issuance of a search warrant on the tenth day of September, 1976.

This Court has set several standards by which affidavits underlying search warrants are to be judged. In *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct., 1509, 12 L. Ed. 2d 723 (1964), the Court set a two-pronged test: (1) The information must be demonstrated to be reliable, and (2) the informant must be demonstrated to be reliable. According to *Aguilar*, supra, both tests must be met if probable cause is to be determined. In the instant case, the affidavit does demonstrate the reliability of the informants, but fails to demonstrate the reliability of the information. Affiant Parra failed to conduct an independent investigation in order to determine the reliability of the information given to him by his informants. The affidavit contains no statement by the affiant or any other law enforcement official that Petitioner lived at the described residence, that he had in the past been suspected of any criminal activity, that he had been observed by affiant or other law enforcement officials either going to or coming from the residence described, or that there was an unusual amount of traffic to and from the residence described, as

would be consistent with selling heroin. In sum, the affidavit contains no facts to support the credibility of the hearsay information relied upon by the affiant.

If the two-pronged test of *Aguilar*, supra, cannot be met, this Court has given law enforcement officials another route to follow. In *Spinelli v. United States*, 394 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), this Court held, absent the proof of probable cause required by *Aguilar*, supra, if there is sufficient detail in the affidavit, it will meet the probable cause requirements of the Fourth Amendment. The affidavit contains no statements as to where in Petitioner's home any heroin might be found, or in what quality or quantity any heroin found might be. There are no statements in the affidavit as to how any heroin found might be packaged or prepared for sale. The affidavit contains no statements as to how the Petitioner might have obtained any heroin, or how and to whom the Petitioner may distribute any heroin.

The prior decisions of this Court in both *Aguilar* and *Spinelli*, supra, are clear in their language as to what information an affidavit must contain in order to establish probable cause. The affidavit in the instant case cannot meet the tests set forth by this Court and therefore does not demonstrate probable cause that the Petitioner possessed heroin in his home on the tenth day of September, 1976, the day that the warrant was issued. As such, the resulting search of Petitioner's home was without probable cause and was unreasonable under the Fourth and Fourteenth Amendments to the Constitution of the United States.

B. THE TRUTHFULNESS OF THE AFFIDAVIT UNDERLYING THE SEARCH WARRANT IS IN QUESTION.

Because of the recent decisions in *Franks v. United States*, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978) and *State v. Gutierrez*, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978), Petitioner may challenge the truthfulness of the affidavit underlying the search warrant. These two recent cases held that a defendant in a criminal proceeding may challenge the truthfulness of an affidavit underlying a search warrant.

This Court in *Franks*, supra, set forth the conditions that must be met by the Petitioner in order to gain a hearing on the truthfulness of the information contained in the affidavit. Petitioner must bear the burden of making a preliminary showing that statements made in the affidavit are false, and that if such statements were eliminated, there would be no probable cause on which to base the issuance of a search warrant.

The affidavit here contains statements that Petitioner "(H)as an on-going heroin trafficking business from the above described house . . ." This statement and other statements relating to continuous activity are necessary to a finding of probable cause. Without them, all other statements in the affidavit are insufficient to establish probable cause due to staleness.

Any statements contained in the affidavit which allege that Petitioner had an on-going heroin trafficking business from his residence during the time period August 10, 1976, to September 10, 1976 are false. Paragraph "L" of the Stipulation of Facts for a non-jury trial (Appendix "C") states, "The parties stipulate that Defendant (Petitioner here) was hospitalized on a 24 hour basis throughout the period August 24, 1976 - September 1, 1976." The Petitioner was not at this residence for one-third of the time period that affiant Parra swore to information that claimed Petitioner had an on-going business from his home. It is obvious that Petitioner could not have had such a business if he was confined to a hospital bed and was not present in his home.

This inconsistency was presented to the New Mexico Court of Appeals. Yet even in light of their own prior decision in *State v. Gutierrez,* supra, which allows for a hearing into the truthfulness of an affidavit once a preliminary showing of false statements had been made, affirmed Petitioner's conviction without an opinion. This inconsistency was not presented to the New Mexico Court of Appeals at the time of their decision and opinion concerning Petitioner's motion to suppress evidence, but was presented on appeal from the conviction.

C. THE AFFIDAVIT IN THE INSTANT CASE WAS ALTERED BY THE ASSISTANT DISTRICT ATTORNEY, THUS PROBABLE CAUSE FOR ISSUANCE OF A SEARCH WARRANT WAS NOT ESTABLISHED BY A NEUTRAL AND DETACHED DISTRICT JUDGE SITTING AS A MAGISTRATE.

Paragraph "I" of the Stipulation of Facts for a non-jury trial, Appendix "C", states that the Assistant District Attorney, James B. Blackmer, made additions to the affidavit that Deputy Sheriff Parra presented to him for approval. Blackmer made the following additions to the affidavit:

> Informant #1 has given BCSO narcotics officers information that has resulted in seizures of heroin on at least two occasions and arrests of several persons possessing and trafficking it. Although this informant #1's latest observation of heroin sales by LUPE GARCIA at above-described residence was during the period 10 August 1976 to 10 September 1976, nevertheless, Informant #1 has been at Lupe Garcia's above described premises on numerous other prior occasions, and during these prior occasions, Lupe Garcia has had heroin at above described premises for sale, and informant has seen heroin there on numerous occasions. According to

> Informant #1 (and 2 and 3), Lupe Garcia has an on-going heroin trafficking business from above described house, and therefore, he has to keep a large quantity of heroin in stock at all times to supply his subordinate pushers and other heroin customers, keeping them coming back to him, and making money from them. Furthermore, he has not been arrested or searched in the past month or two (to affiant's knowledge), and thus he has no incentive to quit dealing heroin, cease or diminish acquiring and selling heroin etc. Additionally, all 3 informants independently of one another and based on personal observations (or hearing admissions by Garcia) state that LUPE GARCIA uses heroin at his above-described house — and he will need heroin daily to supply his habit, as well as have heroin paraphernalia to inject such heroin after cooking it.

Blackmer than wrote on the affidavit, "Reviewed and approved 10 September 1976 at 12:13 P.M. (with above additions and corrections)" and then Blackmer signed the affidavit before affiant Parra proceeded to the judge for formal issuance of the search warrant. Deputy Sheriff Parra then swore to the affidavit (with Blackmer's additions) in front of Judge Ryan, who issued the warrant at 3:16 P.M. on September 10, 1976.

Blackmer's additions were added to cure an otherwise fatally defective affidavit. If Blackmer had to sign the affidavit as being approved prior to a judge issuing a warrant, is the judge leaving the determination of probable cause to the District Attorney's Office?

In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), the State's Attorney General, acting in his capacity as Justice of the Peace, issued a search warrant in a case in which he took over the investigation and then prosecuted. This Court held that the Attorney General

was not the neutral and detached magistrate required by the United States Constitution and that the warrant was invalid. In the present case, the requirement that affidavits for search warrants be approved by the District Attorney's Office, and the probability of the judge's reliance on that approval as indicating probable cause exists, is tantamount to the District Attorney's Office having the ability to issue search warrants.

This Court in *Mancusi v. Deforte,* 392 U.S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968), held that a District Attorney's subpoena duces tecum does not constitute a search warrant for the same reasons that the Court in *Coolidge* supra, held that warrant was invalid.

The often competitive business of ferretting out criminal activity makes it imperative that a neutral and detached magistrate perform his duties of determining the existence of probable cause prior to issuing a search warrant, and not let the Assistant District Attorney, who is to try the case make such a determination. The public needs to be protected from the over zealous prosecutor. The Constitution makes absolute the right of the people to be secure in their homes against unreasonable searches. As the Court stated in *Sgro v. United States,* supra:

> The proceeding by search warrant is a drastic one. Its abuse led to the adoption of the Fourth Amendments, and this, together with legislation regulating the process, should be liberally construed in favor of the individual (Page 210)

The prosecutor did not take an oath at the issuance of the warrant, nor did he take an oath at any subsequent hearing or trial resulting from that warrant. The prosecutor cannot place words in the mouths of his witnesses, nor can he testify, yet in the instant case, the prosecutor was able to

draft and approve the document that secured the evidence for his case and insured its introduction at trial.

VII
CONCLUSION

For reasons and authorities stated, it is respectfully requested that Petitioner's Writ of Certiorari be granted, and that the Judgment of the New Mexico Court of Appeals be reversed.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v. No. 3621

LUPE GARCIA,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTRY
Maloney, Judge

TONEY ANAYA, Attorney General
Santa Fe, New Mexico Attorney for Appellee

JACK SMITH
Albuquerque, New Mexico Attorney for Appellant

MEMORANDUM

Summary affirmance was proposed for reasons stated in the calendar assignment. The memorandum in opposition is based on speculation that the affiant swore falsely, but the parties stipulated that affiant swore to the material added by the assistant district attorney. There is no claim of false swearing, only speculation. No cause has been shown why there should not be summary affirmance.

The judgment and sentence are affirmed.

IT IS SO ORDERED.

JOE W. WOOD
Chief Judge

HAZEL M. DAVIS,
Clerk

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellant,

v.

LUPE GARCIA,
Defendant-Appellee.

No. 2822

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

MALONEY,
Judge

TONEY ANAYA, Attorney General
ERNESTO J. ROMERO, Asst. Attorney General
Santa Fe, New Mexico
Attorneys for Plaintiff-Appellant

JACK SMITH
Albuquerque, New Mexico
Attorney for Defendant-Appellee

OPINION

WOOD, Chief Judge

This appeal by the State involves the legal sufficiency of an affidavit for a search warrant. The trial court granted defendant's motion to suppress the evidence seized in the search pursuant to the warrant. It did so on the basis that the information recited in the affidavit was stale and therefore

did not supply probable cause for issuance of the warrant. We discuss: (1) reliability of information supplied to the judge issuing the warrant, (2) staleness of the information in the affidavit, and (3) reliability of the informants.

Reliability of the Information Supplied to the Judge

The appeal was originally assigned to the "Legal" calendar on the basis that "staleness" would be determined by the affidavit contained in the district court file. Defendant moved for reassignment of the case to the "Limited" calendar, claiming that the staleness issue had been determined on the basis of evidence presented at the suppression hearing. After hearing argument on the motion to reassign, there was a question as to whether the trial court had tried the truthfulness of the affidavit. Our concern was based on State v. Baca, 84 N.M. 513, 505 P.2d 856 (Ct. App. 1973). Accordingly, we granted the motion and reassigned the case to the "Limited" calendar. See N.M. Crim. App. 207(b) and (c).

In *Baca*, supra, defendant contended that he had a right to challenge the truthfulness of the allegations in the affidavit. *Baca* points out that the decisions in other states are in conflict as to when such attacks are permissible. *Baca* states:

> "Although we incline to the view that an attack is permissible if the claim is that the allegations are perjurious, we do not decide the question of when attacks should be allowed. Whenever other jurisdictions have allowed an attack, it has been directed to the truthfulness of the affiant's allegations. In this case, defendant did not attack the truthfulness of the statements made by the officers who signed the affidavit; the attack was on the truthfulness of the information received from an informer."

The transcript of the suppression hearing shows there was no attack on the truth of the affiant's allegations. Accordingly, the question of when such attacks should be allowed is not an issue in this case.

Staleness of the Information in the Affidavit

The affidavit sought a warrant to search a described premises, and the defendant, for heroin and paraphernalia used in connection with heroin. The affidavit sets forth information that the affiant officer received from three informants. The affidavit recites that informant I "has personally purchased heroin from the above subject at above premises the latest being approximately one month ago."

Defendant relies upon this one-month delay to support his contention of no probable cause because of stale information. The significance of this time factor depends on whether there was an isolated transaction or a continuing series of events. United States v. Johnson, 461 F.2d 285 (10th Cir. 1972); United States v. Harris, 482 F.2d 1115 (3rd Cir. 1973). See footnote 9 in Andreson v. Maryland, ____ U.S. ____, 49 L.Ed.2d 627, 96 S. Ct. 2723 (1976); footnote 2 in United States v. Harris, 403 U.S. 573, 29 L.Ed.2d 723, 91 S. Ct. 2075 (1971). As stated in State v. Austria, 524 P.2d 290, 294 (Hawaii 1974):

> "If there is a reasonable basis in the affidavit for the conclusion that the criminal activity alleged by the informer is of a continuing, on-going nature, the passage of time between the informer's last observations of that activity and the issuance of the warrant is less significant than when no such showing is made in the affidavit."

The affidavit contains a reasonable basis for concluding that defendant was engaged in criminal activity of a continuing, on-going nature. The affidavit recites:

1. Informant I last observed heroin sales by defendant at the described premises between August 10 and September 10, 1976.

2. Informant I had been at the described premises on numerous occasions, and on those prior occasions defendant had heroin for sale. Also, that informant I had seen heroin on the premises on numerous occasions.

3. All three informants, independently of one another, state that defendant uses heroin and needs heroin daily to supply his habit. These statements were based either on the informant's personal observations or admissions by defendant.

The foregoing shows a continuing activity in connection with heroin up to the date of the affidavit, which was September 10, 1976.

Affidavits are to be read with common sense. United States v. Harris, 403 U.S. 573, supra; State v. Bowers, 87 N.M. 74, 529 P.2d 300 (Ct. App. 1974). The above information was sufficient for the judge who issued the search warrant to conclude there was a probability of criminal conduct. State v. Bowers, supra. The affidavit does not show stale information.

Reliability of the Informants

Defendant asserts that one cannot base probable cause on the continuing conduct recited in the affidavit. He asserts that the continuing conduct supplied by the informants cannot be considered because the reliability of the informers is not shown. Once the continuing conduct is eliminated, defendant asserts the only information left to support probable cause is a one-month-old purchase by one informer. We disagree.

Although Hudson v. State, 89 N.M. 759, 557 P.2d 1108 (1976) does not refer to United States v. Harris, 403 U.S. 573, supra, it does follow the approach used in *Harris*. That approach is to determine whether there was a substantial basis for believing there is a factual basis for the information furnished. In this case the question is whether there is a substantial basis for believing the information received from the informants was based on fact rather than rumor or speculation.

Here, we have informant I's purchase of heroin (See State v. Archuleta, 85 N.M. 146, 509 P.2d 1341 (Ct. App. 1973)), his past observations of heroin on the premises and his observations of sales from the premises during the month prior to issuance of the search warrant. We also have all three informants stating, either on the basis of personal observations or admissions from the defendant, that defendant is a daily heroin user. The affiant also states that the informants have provided information in the past which led to the arrest of several persons for possession and trafficking in heroin. See United States v. Harris, 403 U.S. 573, supra. The judge who signed the warrant could conclude from the foregoing that the informants were reliable.

Defendant complains of other statements in the affidavit. We need not consider them. The statements in the affidavit discussed in this opinion show a substantial basis for believing the informants.

The trial court erred in granting the motion to suppress on the basis that the information in the affidavit was stale. The order granting the motion is reversed. The cause is remanded with instructions to deny the motion to suppress.

IT IS SO ORDERED.

JOE W. WOOD
Chief Judge

APPENDIX C

STATE OF NEW MEXICO DISTRICT COURT
IN THE COUNTY OF BERNALILLO

STATE OF NEW MEXICO,
Plaintiff

v. NUMBER 28040, Criminal

LUPE GARCIA,
Defendant.

STIPULATION OF FACTS
FOR NON-JURY TRIAL

PLAINTIFF, State of New Mexico, by and through undersigned counsel, Assistant Attorney General James F. Blackmer, and the Defendant himself, LUPE GARCIA, and his Defense Counsel, Mr. Jack Smith, Esq., each and all agree and stipulate (as shown by their signatures subscribed below):

1. The Defendant and his Counsel and the State have each and all waived their right to trial by Jury by written Waiver filed in this cause 19 December 1977. That waiver is still effective and controls the trial herein. Trial in this cause commenced before this Court on 31 January 1978, within the period of time agreed upon by Defendant and his counsel.

2. Defendant and his counsel and the State of New Mexico now each and all agree that trial of this matter shall continue before the Court (Honorable James A. Maloney) without a jury, and shall be on the below facts, stipulated by the parties as true for purposes of this trial.

3. The Defendant again raises — and does not

waive — each and all of his motions previously filed and litigated in this Court (including, but not limited to, each and all of his motions to suppress evidence and statements, and Defendant's motions to reconsider motion to suppress, and any and all other motions previously filed by the Defendant and denied by this Court and/or the New Mexico Court of Appeals and Supreme Court). Each and all these issues and motions are preserved before, during, and after this trial and on any appeal(s) thereafter, and are not waived in any way by this trial or method of trial.

4. The State of New Mexico will dismiss, and hereby does dismiss at this point COUNT II of the Indictment (charging intentional possession of Methadone, a Schedule II narcotic drug), and trial will proceed before this Court without a jury, and on below stipulated facts, ONLY on Count I of the Indictment (i.e., "possession with intent to distribute heroin"). Additionally, because this is a Controlled Substances charge and for other reasons, the State certifies that the State will not seek, file, or prosecute any habitual Information or charges or documents of a similar nature in this cause to enhance any sentence in the present cause in the event Defendant is found Guilty and convicted by this Court of Count I of this 28040 Indictment. Therefore, if Defendant is convicted, the maximum sentence the Court could impose is 10-50 years imprisonment, and/or a fine not to exceed $10,000.

5. The State hereby certifies that if the Defendant is found Guilty and convicted by this Court of Count I of the Indictment 28040 herein, that this would be Defendant's first felony charge or conviction since 1965 (also, Defendant has never been convicted of any felony other than a 4th-degree felony: a "Forgery of Endorsement" conviction in 1957 in Bernalillo County Criminal Cause 13855, and a burglary/assault conviction in 1965 in Bernalillo County Criminal Cause 17029). Additionally, at the time of the

Sheriff Department search of Defendant and his house in this present cause 10 September 1976, the Defendant was polite and cooperative with police — so much so that the officers did not even handcuff the Defendant at his arrest. Additionally, Defendant has not been arrested, indicted, or prosecuted on any other felony charge(s) since the present 10 September 1976 incident, resulting in this Indictment 28040.

STIPULATION OF FACTS

As pointed out above, the Defendant and his counsel again renew their objections to introduction into evidence by the State of any alleged heroin, or laboratory analysis of any such alleged heroin, or statements allegedly made by the Defendant to or in the hearing of law enforcement officers, and hereby renews all motions filed or litigated in this cause to suppress such heroin evidence (or laboratory analysis of it), Defendant's statements to police, etc.

However, the Court having refused to suppress such evidence, and hereby adhering to these rulings, the State and the Defendant and his counsel each and all agree that the following facts occurring on or after 10 September 1976 upon which the Court shall determine the guilt or innocence of the Defendant on Count I of this Indictment 28040 ("Possession with intent to distribute Heroin"); the below stipulated facts do not preclude the Defendant or defense from putting on any relevant, admissible evidence before this Court in this trial (or at any post-trial hearing concerning sentencing, if any), in his own defense on the merits or in extenuation or mitigation of the offense (or punishment, if convicted):

A. On 10 September 1976, Bernalillo County Sheriff Department officers bearing a District Court search warrant for the Defendant and his house at 800 Armijo Place, S.W.,

Albuquerque, Bernalillo County, New Mexico, arrived at the Defendant's said house. This and the following events occurred in Bernalillo County, New Mexico on 10 September 1976.

B. After entering Defendant's residence at 800 Armijo Place, S.W., the officers executed the search warrant, searching for heroin and other evidence described in the Affidavit and Search Warrant. Officer Fred Torres searched a brown chest of drawers in the southeast bedroom, and in the second drawer in a paper sack, Officer Fred Torres found and seized several ounces of a brown powder substance (subsequent laboratory analysis of this substance by a qualified, trained expert chemist revealed the substance to be heroin). The Defendant, LUPE GARCIA, who was present in his above house during the entire search, advised the officers that Rosalie Maes (a woman also present in the house) had nothing to do with the heroin.

C. Sheriff Officer Mike Parra also searched in the same bedroom of 800 Armijo Place, S.W., and found another package of suspected heroin in a men's coat pocket, in a closet of the same southeast bedroom. Within a minute or two of this find, Officer Ken Northcutt found still another bag of suspected heroin in another men's coat in the closet. Laboratory analyses on the powder contents of these two bags of suspected heroin by the above said qualified, competent expert chemist revealed that these two bags also contained heroin. Again, the Defendant emphasized that Rosalie Maes had nothing to do with these two bags of suspected heroin either.

D. Officers Northcutt and Parra returned to the same southeast bedroom closet and continued their search, finding $1095 in US Currency in another men's coat; this money was counted in front of the Defendant, who advised "it was all there." (This money will be turned over to Defendant and/or his counsel, Jack Smith, at the conclusion of trial or sentencing of the Defendant in this cause).

E. Enroute to the Sheriff Department for booking, the Defendant reiterated that all the heroin was his, and he also admitted using "about a gram per day" of heroin.

F. The Defendant admitted to the officers that he had paid $1,400 per ounce in Mexico for the heroin. The officers weighed the heroin they found and seized from the Defendent's residence and noted the following weights:

(1.) about 7 ounces of Heroin (found and seized by Fred Torres in the second drawer of the dresser in Defendant's southeast bedroom);

(2.) about 4 ounces of Heroin (found and seized by Mike Parra from Defendant's coat in the closet in the same southeast bedroom);

(3.) about 5 ounces of Heroin (found and seized by Mike Parra and Ken Northcutt in another of the Defendant's coats in the closet in the same southeast bedroom).

This is a total of 16 ounces of heroin found and seized by Sheriff officers during the search.

G. An ounce contains 28.35 grams. In the knowledge and experience of Lt. Dan Lundy (over 6 years narcotics experience including undercover heroin buying experience), Sgt. Ray Mares (over 6 years narcotics experience, including undercover heroin buying experience), Michael Parra (over 3 years narcotics experience, including undercover buys and/or negotiations for heroin), and Kenneth Northcutt (over 4 years of narcotics and heroin experience), heroin on the street sells for $50 per gram. This would mean an ounce of heroin is valued at about $1400 on the street in 1976...consistent with Defendant's statement that he paid $1,400 per ounce for the above heroin in Mexico. Thus, the above 16 ounces of heroin would be worth a MINIMUM of $22,4000—and could be worth much more if the heroin were

"cut" (diluted), increasing its weight and quantity, before such street sales. None of the above officers have ever seen or heard of this amount of heroin (16 ounces—about 453 grams) being strictly for personal use; even if the Defendant were using a full gram of this heroin per day, it would require over a year to use all this heroin...or longer if he "cut" it before using it. There is no evidence that anyone other than the Defendant, Lupe Garcia, possessed or had anything to do with the above 16 ounces of heroin on 10 September 1976 at the time of its discovery and seizure by Sheriff's Department officers, and these same 16 ounces of heroin seized by these officers 10 September 1976 from Defendent's residence at 800 Armijo Place, S.W., Bernalillo County, New Mexico, was testified by a qualified, competent expert chemist, who found and determined that such 16 ounces of substance was in fact heroin. Heroin is a narcotic drug enumerated in Schedule I of the New Mexico Controlled Substances Act (see Section 54-11-6, N.M.S.A., 1953 Comp., as amended).

H. With reference to the above admissions by the Defendant that Rosalie Maes "had nothing to do with it", it is Defendant's belief and contention (and testimony, if he were called to testify) that his statement, "she has nothing to do with it" referred to some alleged amphetamines the officers found in her purse, and that none of his admissions about controlled substances pertained to Heroin, or that the heroin was in fact his heroin. The officers, if called to testify, would testify that it is their recollection and belief that Defendant affirmed that Rosalie Maes had nothing to do with the alleged amphetamines, and also that he affirmed that she had nothing to do with any of the alleged heroin the officers found and seized. This dispute between the parties as to what the Defendant said (or did not say), and what he was referring to (i.e., to amphetamines, to heroin, to neither, or to both, etc.) is for the Court to resolve, and the parties are stipulating only that if called, the Defendant and Rosalie

Maes would testify that Defendant was referring only to the amphetamines allegedly found by the officers in Maes' purse, and that if called to testify, the officers would testify that the Defendant also stated that Rosalie Maes had nothing to do with any of the heroin found or seized, either.

I. For purposes of appeal only (if Defendant is convicted), the Affidavit for Search Warrant is herein incorporated by reference and by reference made a part hereof (copies of the affidavit is presently in the Court File #28040 itself, and another copy is in evidence in the District Court Clerk's office, Bernalillo County, and the original is part of the District Court Clerk's records, criminal division, Bernalillo County Courthouse). The parties stipulate that the affidavit was prepared with two separate typewriters: the larger printing/typing from a Sheriff's office typewriter (the words therein dictated by Mike Parra to a Sheriff Department secretary), and the smaller typing (at the end of the Affidavit) is made by the typewriter of James F. Blackmer at the D.A. office after the Sheriff Department secretary's typing occurred, and that Mr. Blackmer personally typed those words onto the Affidavit from the words and information supplied to Mr. Blackmer by Michael Parra (affiant). Thereafter, this Affidavit (with typing by the Sheriff Department secretary, and the typing by James F. Blackmer) was taken to District Judge Joseph C. Ryan by Michael Parra, who swore to the Affidavit (both sections of typing thereon from the two typewriters from the two separate typists), and Judge Ryan administered the oath, signed the Affidavit, and signed and issued the search warrant—all on 10 September 1976—which the officers then executed at Defendant's house the same day.

J. The parties also stipulate that, at a September 1977 re-hearing on Defendant's motion to suppress evidence, further evidence not considered by (or known to) the Court of Appeals was presented: the uncontradicted evidence showed

that during the 30-day period 10 August-10 September 1976 period mentioned in the Search Warrant Affidavit (in which period the informant alleged he/she had been inside Defendant's house and observed heroin therein or being possessed and/or sold by Lupe Garcia...see the Search Warrant Affidavit for exact wording), the Defendant was hospitalized for a period of a week to 10 days; see testimony presented at the September 1977 motions hearing, which also is incorporated herein by reference (for purposes of appeal only—if Defendant is convicted in the present trial of this cause).

K. The parties also stipulate that all times and in all proceedings before this Court in this cause (i.e., at all pretrial motions or motions hearings, discussions with the prosecutor or the Court, and now at trial of this Cause), the State has invoked the provisions and privilege of Rule 510 of the New Mexico Rules of Evidence ("Informer Privilege" rule) and has refused and now continues to refuse to disclose the identity or address of (or produce) any informant used by the Sheriff's department to obtain information alleged in the Search Warrant Affidavit, or the identity of any of the informants referred to in the Search Warrant Affidavit. The State hereby invokes the privilege of Rule 510 and continues to refuse to disclose the identity, address, location, or other information that would identify or disclose the whereabouts or identity of the informants referred to in the Search Warrant Affidavit or otherwise used by the Sheriff's Department to gather information concerning the Defendant before or while the Search Warrant Affidavit was being prepared. The State also certifies that none of the informants mentioned or referred to in the Search Warrant Affidavit was present at Defendant's house during the search warrant execution or police presence there, and were not witnesses to any find of heroin or other evidence therein by the Sheriff officers, and were not witnesses to any statements or admissions made by the Defendant to the Sheriff officers.

L. The parties stipulate that Defendant was hospitalized on a 24-hour basis throughout the period 24 August 1976-1 September 1976, and was not at his 800 Armijo Place, S.W. home during that period 24 August-1 September 1976.

JAMES F. BLACKMER
Assistant Attorney General
Counsel for Plaintiff

LUPE GARCIA
Defendant

JACK SMITH
Attorney at Law
Counsel for Defendant

SUBSCRIBED BEFORE ME IN OPEN COURT BY THE ABOVE 3 PERSONS THIS 25th DAY OF APRIL 1978, and FILED IN OPEN COURT IMMEDIATELY THEREAFTER:

JAMES A. MALONEY
Judge

AFFIDAVIT FOR SEARCH WARRANT

AGENT MIKE PARRA, B.C.S.O. Narcotics Division, being duly sworn, on his oath, states that:

he has reason to believe that on the following described premises the person of LUPE GARCIA

THE RESIDENCE IS LOCATED AT 800 ARMIJO PLACE SW. THE RESIDENCE IS WHITE STUCCO FLAT ROOM STRUCTURE. THE FRONT DOOR FACES NORTHEAST. TWO WINDOWS NORTHEAST. THERE IS AN OPEN FRONT PORCH ALSO THERE IS SOME RED BRICK SIDING ON THE FRONT PORCH. ONE DOOR FACES WEST, AND ONE WINDOW FACES WEST, AND

THERE IS THREE FOOT CHAIN LINK FENCE IN THE FRONT AND ON THE WEST SIDE OF THE RESIDENCE. AND THERE IS ALSO A CHIMNEY ON THE WEST SIDE. THERE IS AN OVAL DRIVEWAY IN FRONT OF THE RESIDENCE. THE RESIDENCE IS LOCATED ON THE CORNER OF ARMIJO PLACE AND ARMIJO ROAD. ALSO, THE RESIDENCE SITS ON THE SOUTH SIDE OF ARMIJO ROAD AND ON THE EAST SIDE OF ARMIJO PLACE.

in the above described county and state there is now being concealed certain property, namely:

HEROIN IN AN UNKNOWN QUANTITY. MISCELLANEOUS PAPERS SUCH AS OLD UTILITY BILLS, OLD MAGAZINE LABELS, AND ETC. SHOWING DEFENDENTS NAME. ALSO, SYRINGES, COOKERS, RAZOR BLADES, AND CUTTING DETERGENT, and other heroin paraphernalia ("caps" of heroin or for wrapping heroin, hypodermic needles, scales, etc.).

Which is designed or intended for use, or which has been used, as a means of committing a criminal offense, would be material evidence in a criminal prosecution, and that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

IN THE PAST 24 HOURS (SEPTEMBER 10, 1976) AFFIANT HAS RECEIVED INFORMATION FROM A CONFIDENTIAL INFORMANT THAT THE ABOVE SUBJECT HAS BEEN TRAFFICKING IN LARGE AMOUNTS OF HEROIN FROM THE ABOVE DESCRIBED RESIDENCE. INFORMANT ADVISED AFFIANT THAT THE ABOVE SUBJECT ONLY SELLS HEROIN TO PEOPLE HE PERSONALLY KNOWS. CONFIDENTIAL INFORMANT HAS PERSONALLY PURCHASED FROM THE ABOVE SUBJECT THE LATEST BEING APPROXIMATELY ONE

MONTH AGO. CONFIDENTIAL INFORMANT ALSO ADVISED AFFIANT THAT THE ABOVE SUBJECT IS A MAJOR HEROIN DEALER THAT THE ABOVE SUBJECT USUALLY HAS LARGE AMOUNTS OF HEROIN IN OR AROUND THE DESCRIBED RESIDENCE BECAUSE OF THE FACT THAT HE (LUPE GARCIA) DISTRIBUTES SOME OF IT TO OTHER INDIVIDUALS UNKNOWN TO INFORMANT AT THIS TIME. THESE OTHER INDIVIDUALS ARE TRAFFICKING THE HEROIN FOR LUPE GARCIA. ALSO, WITHIN THE PAST MONTH, AFFIANT HAS ALSO RECEIVED INFORMATION FROM AT LEAST TWO OTHER CONFIDENTIAL SOURCES AND THEY ALSO ADVISED AFFIANTS THAT LUPE GARCIA IS IN FACT A MAJOR HEROIN DEALER IN THE ALBUQUERQUE AREA. THESE OTHER TWO CONFIDENTIAL SOURCES HAVE ALSO ADVISED AFFIANT THAT LUPE GARCIA HAS HIS OWN PERSONAL PUSHERS. THESE CONFIDENTIAL SOURCES GAVE AFFIANT THIS INFORMATION AND IN FACT ARE HEROIN ADDICTS AND HAVE BEEN SO MOST OF THEIR LIVES. THEREFORE, THESE CONFIDENTIAL SOURCES KNOW WHAT HEROIN LOOKS LIKE HOW IT IS SOLD AND HOW IT IS PREPARED FOR INJECTION. THESE CONFIDENTIAL INFORMANTS HAVE PROVEN THEMSELVES TO AFFIANT WITH CORROBORATION INFORMATION WHICH HAS RESULTED IN THE ARREST OF AT LEAST FOUR PEOPLE TRAFFICKING IN LARGE AMOUNTS OF HEROIN IN THE ALBUQUERQUE AREA. ALSO, THESE CONFIDENTIAL SOURCES HAVE BEEN ADVISED BY AFFIANT THAT ANY MISLEADING INFORMATION COULD RESULT IN ARREST AND IN CHARGES FOR FALSEFYING INFORMATION. THEREFORE, AFFIANT REQUEST THAT A SEARCH WARRANT BE SET-FORTH FOR THE RESIDENCE AND FOR THE ABOVE SUBJECT IN ILLEGAL TRAFFICKING OF NARCOTICS.

Informant #1 has given BCSO narcotics officers information

that has resulted in seizures of heroin on at least two occasions and arrests of several persons possessing and trafficking it. Although this informant #1's latest observation of heroin sales by LUPE GARCIA at above-described residence was during the period 10 August 1976 to 10 September 1976, nevertheless, Informant #1 has been at Lupe Garcia's above-described premise on numerous other prior occasions, and during these prior occasions, Lupe Garcia has had heroin at above-described premises for sale, and informant has seen heroin there on numerous occasions. According to Informant #1 (and 2 and 3), Lupe Garcia has an ongoing heroin trafficking business, from above-described house, and therefore, he haas to keep a large quantity of heroin in stock at all times to supply his subordinate pushers and other heroin customers, keeping them coming back to him, and making money from them. Furthermore, he has not been arrested or searched in the past month or tv ~ (to affiant's knowledge), and thus he has no incentive to quit dealing heroin cease or diminish acquiring and selling heroin etc. Additionally, all 3 informants independently of one another and based on personal observations (or hearing admissions by Garcia) state that LUPE GARCIA uses heroin at his above-described house—and he will need heroin daily to supply his habit, as well as have heroin paraphernalia to inject such heroin after "cooking" it.

MICHAEL PARRA
B.C.S.O. Narcotics Agent

SUBSCRIBED AND SWORN TO BEFORE ME THIS 10th DAY OF SEPTEMBER 1976.

Reviewed and approved 10 September 1976 at 12:13 p.m. (with above additions and corrections)

JAMES F. BLACKMER

JOSEPH RYAN
District Judge